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91-1632

NO. _____

Supreme Court, U.S.
FILED
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

JAMES GILBERT MARCUM,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR PETITIONER

April 13, 1992

QUESTION PRESENTED FOR REVIEW

The question presented by this petition is:

Whether the panel below sanctioned a gross departure from the accepted and usual course of judicial proceedings which denied petitioner the due process guaranteed by the Fifth Amendment when it approved the district court's denial of a curative instruction after the Government argued in closing that the double jeopardy clause barred any subsequent prosecution of petitioner.

LIST OF PARTIES

The parties to the proceeding below were the petitioner James Gilbert Marcum and his co-appellants, Michael John Canino, John G. Flynn, and David Leonard Malkin, and the respondent, the United States of America.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, James Gilbert Marcum, respectfully prays that a Writ of Certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Seventh Circuit entered in this action on November 27, 1991.

OPINION BELOW

The Seventh Circuit Court of Appeals affirmed the petitioner's conviction in an opinion issued on November 27, 1991, in United States v. Canino, 949 F.2d 928 (7th Cir. 1991). The opinion below was previously released as a slip opinion, United States v. Canino, Nos. 89-1719, 89-1721, 89-1740 and 89-1746 (7th Circuit, November 27, 1991). (See Appendix B).

JURISDICTION

The opinion which petitioner asks this Court to review was entered by the United States Court of Appeals for the Seventh Circuit on November 27, 1991. A timely Petition for Rehearing with a Suggestion for Rehearing In Banc was denied on January 14, 1992. (See

Appendix D). This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case requires interpretation of the Fifth Amendment to the Constitution of the United States which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

The petitioner was tried in the United States District Court for the Southern District of Illinois on one count of a two-count indictment which was returned on September 29, 1987. The petitioner and 19 other named individuals were charged with conspiring to distribute marijuana in violation of 21 U.S.C. §§841(a)(1) and 846. The indictment charged petitioner with engaging in conspiratorial activity within three counties in the Southern District of Illinois and in 10 additional states.

The petitioner and five other individuals went to trial on November 14, 1988, before Chief Judge James L. Foreman and a jury in the Southern District of Illinois. One of the

petitioner's co-defendant's cases was severed during the trial.

On January 30, 1989, the jury returned a guilty verdict as to the petitioner on the count with which he was charged. The district court entered a judgment of conviction against the petitioner on March 29, 1989, and sentenced petitioner to 22 years imprisonment.

The petitioner filed a timely appeal to the United States Court of Appeals for the Seventh Circuit. That court had jurisdiction over petitioner's direct criminal appeal pursuant to 28 U.S.C. §1291. The Seventh Circuit Court of Appeals, on its own motion, consolidated petitioner's appeal with the appeals of four of his co-defendants. One of petitioner's

co-defendants, Joseph Watts, subsequently withdrew his appeal.

The United States Court of Appeals for the Seventh Circuit affirmed petitioner's conviction and sentence by its decision rendered on November 27, 1991. A timely Petition for Rehearing, with Suggestion for Rehearing In Banc, filed by the petitioner was denied by the Seventh Circuit Court of Appeals on January 14, 1992. Petitioner now timely files this Petition for Writ of Certiorari.

REASON WHY THE WRIT SHOULD BE GRANTED

THE PANEL BELOW SANCTIONED A GROSS DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF PROCEEDINGS WHICH DENIED PETITIONER THE DUE PROCESS GUARANTEED BY THE FIFTH AMENDMENT WHEN IT APPROVED THE DISTRICT COURT'S DENIAL OF A CURATIVE INSTRUCTION AFTER THE GOVERNMENT ARGUED IN CLOSING THAT THE DOUBLE JEOPARDY CLAUSE BARRED ANY SUBSEQUENT PROSECUTION OF PETITIONER.

This Court should grant certiorari to review the Seventh Circuit Court of Appeals' decision in petitioner's case because that court sanctioned a departure from the usual and accepted course of judicial proceedings by the district court which deprived petitioner of his right to a fair trial. During closing argument, Assistant United States Attorney Michael Carr made the following misstatement:

> Now I have been over and I went over to begin with the individual counts about how the marijuana actually went through. I think

that it is important to maybe by analogy suggest what's going on here. Someone wants to get rid of someone so they run over to Philadelphia and they secretly find this person making a bomb. You grab, you say look, I want to get rid of this person. Can you get me one? Yes. He hands him a bomb. The guy comes to southern Illinois, plants it in his car and blows him up, blows him to here after.

Well now the guy in Philadelphia, come trial date, he says wait a minute. I didn't know it was going to southern Illinois. I had no idea of it. I didn't even know who it was. I had no idea who it was that was involved, who was to be the proposed victim.

That's what they are doing here. But did you know when you sold the bomb the general purpose of what was going on? Well yeah but I didn't know where it was. Well under their theory, there has to be two trials. That is not the law. You don't have to have a trial here and a trial in Pennsylvania. And there's also been statements...

MR. HIRSCHHORN: Excuse me, Judge. I object. We have never opted for two trials under our theory. Counsel knows that we would not

argue for that. I object. We did not.

THE COURT: I don't...

MR. CARR: Mr. Hirschhorn...

THE COURT: Remember.

MR. CARR: Let them be charged in Pennsylvania. Mr. Malkin said, let them be charged in Pennsylvania. Mr. Sheppard said, let them be charged in Florida or Pennsylvania, but not here. Well this is it, folks. The plea agreements that they have talked about where they say they could be charged in all these other counts, there is a section in the plea agreement that they didn't read out loud that's underlined. It says to the extent that the double jeopardy clause applies.

Well what does that mean? That means this is the trial. You only gave to go to trial once for the charge. It's right here. The idea let them be charged in Philadelphia or Florida, that's gone. The double jeopardy clause applies. It's in all the plea agreements. Those other people can't be charged for the same offense in Missouri that this same conspiracy is charged. It's unconstitutional and they know it.

[Pet.App. 17-19] (emphasis added). Counsel for petitioner subsequently asked the district court for a supplemental jury instruction to rebut the erroneous double jeopardy issue which the prosecutor prejudicially injected into the trial.

Subsequent to jury instructions being given the following exchange occurred:

> MR. HIRSCH: Sir, with respect to supplemental matters, it's the position of the defendant Malkin that Mr. Carr unfairly and prejudicially injected an issue into the case in the nature of double jeopardy. He made arguments with respect to double jeopardy. His argument in part was keyed to double jeopardy and I think that this jury should be instructed and admonished that double jeopardy, or formal jeopardy or any theories related thereto are not involved in this case.
>
> THE COURT: It came up in the argument over the language in the plea agreements.

MR. HIRSCH: I understand that. I understand that.

THE COURT: I don't know. Do you have any comment about it?

MR. CARR: I think it's fair response when an individual, the individuals that I named in the argument said send it to Pennsylvania or send it to Florida. I cite the Seventh Circuit case of United States v. Bruscino, where in essence the same kind of arguments were being made and the Appellate Court said that there was nothing wrong with telling the jury the truth, especially in light of the fact that the plea agreements themselves contained the clause. They were questioned at length about the clause. One of the witnesses even talked about the double jeopardy clause and that he didn't feel like he was eligible to be prosecuted.

I think it's a fair comment on the evidence, in light of the arguments by the, by Mr. Hirschhorn, Hirsch, and Sheppard.

THE COURT: I will not give any additional supplemental instruction at this time. Do you have anything?

* * *

> MR. HIRSCHHORN: However, we renew all the objections that we made and all the arguments previously made and respectfully request permission from the court to adopt our extensive arguments during the two days off and on of jury charge conference.
>
> THE COURT: You have that permission. That may be part of the record.

[Pet.App. 38-40]. Since petitioner had earlier filed a pleading adopting all motions and objections of his co-defendants, defendant Malkin's request for a supplemental instruction, and co-defendant Canino's renewal of all prior objections and arguments, preserved the issue of the denial of the requested supplemental instruction for the petitioner.

Petitioner further subsequently objected to the Government's improper rebuttal argument and requested a supplemental jury instruction to clarify

and correct the Government's improper and inaccurate assertions regarding the effect of the Double Jeopardy Clause. [Pet.App. 40-41]. Petitioner requested the jury be instructed:

> You as members of the jury are not to be concerned in any way whether a defendant might be subject to prosecution in another jurisdiction being it state or federal. You as members of the jury shall not, as you have been incorrectly informed, consider that the Double Jeopardy Clause of the United States Constitution would bar successive state or federal prosecutions upon the return of your verdict.

[Pet.App. 40-41, Petitioner's Jury Instruction No. 33]. The district court refused to give any curative instruction, stating:

> With regard to your request for supplemental instruction, the court has looked at the Roth case and had Patty review Mr. Carr's comments in the closing portion of the argument and it appears to me that his comments related to the witnesses, Podesta in particular.

> I find that if anything, this was an invited response situation and really peripheral to the issues with regard to possible double jeopardy of the defendants. So I'm not going to give the tendered instruction and it can be left here for the record, Mr. Sheppard.

[Pet.App. 41-42]. Contrary to the district court's conclusion, the Government's irrelevant references to plea agreements compounded the prosecutor's inaccurate legal assertions and further prejudiced the petitioner.

The panel for the Seventh Circuit Court of Appeals found:

> The prosecutor's statement, in its context, was not an erroneous statement of the law. Drug offenses committed in Pennsylvania constituted the basis of the conspiracy charge in the Southern District of Illinois. If the government brought a subsequent <u>conspiracy</u> charge in Pennsylvania, then the Double Jeopardy Clause would intervene because in that case defendants would be prosecuted for the same offense. The prosecutor's comment, on its face, cannot seriously be

> understood to mean that charges concerning the lesser-included offenses constituting a conspiracy in this case could never be brought against the defendants if they are acquitted. The prosecutor only acknowledged the well-understood rule that the government could not charge another conspiracy against the defendants based on the same conduct used to prove this conspiracy.

[949 F.2d at 938-39, Slip Op. at 14] (emphasis in original). While the panel found that the Government's comment could not "seriously be understood to mean" that petitioner and his co-defendants could not subsequently be tried for related substantive acts, it is patently obvious from the face of the statement that the prosecutor stated that the Double Jeopardy Clause barred any further prosecution for any and all substantive crimes committed elsewhere.

The Government claimed in response to the request for the supplemental instruction that the prosecutor's comment was made in response to comments made by counsel for co-defendants Canino and Malkin and by petitioner's counsel. [Pet.App. 39]. During closing argument, counsel for defendant Canino argued that Mr. Canino was not part of the single charged conspiracy but rather was engaged in a smaller conspiracy that did not reach into the Southern District of Illinois. [Pet.App. 10-12]. In particular, counsel for defendant Canino stated:

> We are relying on the law that the Judge will charge you and this in a nutshell, that this was not a single conspiracy, not a single overall conspiracy but rather several mini conspiracies, several sprite small little conspiracies; each conspiracy is separate buyer and seller relationship; not, not

that Mr. Canino was part of the overall 600,000 pound conspiracy.

[Pet.App. 11].

Likewise, counsel for defendant Malkin argued:

> The prosecution has brought this case in the Southern District of Illinois. The prosecution has alleged that there was this huge conspiracy, because they want it all. They want it all and they want it here. I don't know how many witnesses I called that where I asked about the plea agreement said one paragraph in their agreement where they say they agree and that they will cooperate with respect to all knowledge that they have about criminal activity in the Southern District of Illinois and with regard to the people that I asked that question, they almost drew a blank. They looked at me like we don't know anything about the Southern District of Illinois.
>
> Now with respect to that point, of the Southern District of Illinois, that point really ties into whether or not the government has proved beyond a reasonable doubt that such a conspiracy, as theorized by the government, actually existed. Whether or not they have proved by credible

> evidence that there was such a thing as this conspiracy....

[Pet.App. 12-13].

Likewise, counsel for petitioner stated during closing:

> The serious problem is that the rules are being attempted to be stretched far beyond anything that I've ever encountered, far beyond, and as I said, if my client has done something wrong, nail him according to the rules, in Pennsylvania, in Florida, or wherever, but not by this undefinable crime called conspiracy.

[Pet.App. 15]. Counsel for petitioner further commented, "And as I have said, if my client has done something somewhere else, the federal government will remind him of it." [Pet.App. 15]. In light of the comments made by counsel for petitioner and his co-defendants during closing it is apparent that the panel for the Seventh Circuit Court of Appeals misconstrued the content and

impact of the Government's erroneous misstatement of the law.

The panel for the Seventh Circuit Court of Appeals found:

> If we thought that the prosecutor's statement could be construed as the defendants construe it, a question arises as to whether the prosecutor accurately described what the Double Jeopardy Clause prohibits.
>
> * * *
>
> We do not need to take sides in this dispute, however, since we have held that the jury was unlikely to construe the prosecutor's statement in context as referring to anything other than a subsequent prosecution for the conspiracy charged in this case.

[949 F.2d at 939, Slip Op. at 14-15] (footnote omitted). The panel below further concluded:

> In light of the strength of the government's case, even if there was error the court's failure to issue a curative instruction referring to the prosecutor's double-jeopardy characterization

> would have been harmless. We find no prejudicial error in the prosecutor's remarks nor an abuse of trial court discretion in denying the defense's motion for curative instruction.

[949 F.2d at 939-40, Slip Op. at 16].

The panel below erred in interpreting the factual and legal assertions made by the prosecutor regarding double jeopardy during his rebuttal argument. Furthermore, the panel below erred by characterizing the substantive crimes which gave rise to the conspiracy charged as "lesser-included offenses" of the conspiracy charge. [949 F.2d at 938, Slip Op. at 14]. This is clearly a misstatement of law. See e.g., United States v. Cruz, 568 F.2d 781, 782 (1st Cir. 1978) (holding, "The law seems well settled that a charge of possession of heroin with intent to distribute cannot

be regarded as a lesser included offense of a conspiracy to distribute heroin."). The panel thus carried out its analysis of the prosecutor's comment based upon a false legal premise.

Furthermore, the panel erred in finding that, "[T]he jury was unlikely to construe the prosecutor's statement in context as referring to anything other than a subsequent prosecution for the conspiracy charged in this case." [949 F.2d at 939, Slip Op. at 15]. The prosecutor erroneously argued that if petitioner and his co-defendants were acquitted of the charged conspiracy the doctrine of double jeopardy would bar prosecution for substantive acts, such as possession with intent to distribute marijuana or distribution of marijuana,

as well as any other charges in all other districts.

This Court recently foreclosed any question regarding whether an individual may subsequently be tried for the substantive offenses which served as the overt acts that formed the basis for a conspiracy conviction. In United States v. Felix, ___ U.S. ___, 60 U.S.L.W. 4259 (March 25, 1992), this Court held that an individual could be tried for conspiracy to manufacture, possess and distribute methamphetamine even though that same individual had earlier been prosecuted for a substantive offense which served as an overt act supporting the conspiracy charge. Id. at 4262-63. In Felix, this Court specifically dealt with the question of whether Grady v. Corbin, 495 U.S. 508 (1990) and Illinois

v. Vitale, 447 U.S. 410 (1980), barred the defendant's prosecution for conspiracy after he had already been prosecuted for the underlying substantive offense which served as an overt act supporting the conspiracy charge.

This Court stated, "But long antedating any of these cases, and not questioned in any of them, is the rule that a substantive crime, and a conspiracy to commit that crime, are not the 'same offense' for double jeopardy purposes." Id. at 4263. Accordingly, this Court held:

> Faced the with [sic] necessity of reconciling this longstanding authority with our language in Grady, we choose to adhere to the [United States v. Bayer, 331 U.S. 532 (1947)-Pinkerton v. United States, 328 U.S. 640 (1946)] line of cases dealing with the distinction between conspiracy to commit an offense and the offense

> itself. These are separate offenses for double jeopardy purposes.

Id. at 4263. Thus, the prosecutor's comments during closing were a prejudicial misstatement of the law.

The jurors were led to believe that petitioner was to be found guilty now or he would never be tried for any substantive act in any other jurisdiction. This argument placed upon the jury an unfair burden which denied petitioner the fair trial to which he is entitled.

The prosecutor's argument was woven into the fabric of a parable about the prosecutor advising his son about rooting out and destroying dandelions in the backyard at his home. [Pet.App. 15-17,19]. The prosecutor in effect stated to the jury that if the jury did

not convict petitioner in their own backyard that the petitioner would be free from prosecution in any other jurisdiction for any substantive crime. The jury was thus presented with a dilemma caused solely by the Government. This dilemma unfairly skewed the jury's deliberative process in favor of the Government.

Refusal to give the requested curative instruction also directly impacted upon petitioner's theory of defense that there was evidence of substantive violations of the law, but there was no evidence that petitioner was guilty of the charged conspiracy.

The panel below further erred in concluding:

> Even if it was error for the court to refuse a curative instruction or an explanation to the jury concerning the various remaining

> criminal charges which could be brought against the defendants and the remaining suitable jurisdictions for prosecutions, the error is harmless.
>
> * * *
>
> The jury was properly instructed as to the nature of the charged offenses and the requirements for a conviction. The government's proof satisfactorily supports, and perhaps compels, a jury finding of guilt as to the charged violations without the government's purportedly ambiguous double jeopardy assertion. In light of the strength of the government's case, even if there was error the court's failure to issue a curative instruction referring to the prosecutor's double-jeopardy characterization would have been harmless.

[949 F.2d at 939, Slip Op. at 15-16]. The panel below erred in finding that denial of the requested curative instruction was harmless error. The panel overlooked that petitioner's theory of defense was that he may have been guilty of other acts in other

districts but that he was not guilty of the charged conspiracy.

In fact, petitioner requested an instruction to that effect. Petitioner's proposed instruction no. 14 stated:

> The defendant is not on trial for any act or conduct not alleged in the indictment.

[949 F.2d at 940, Slip Op. at 16]. The district court modified and gave another instruction of petitioner's, which it determined to be the equivalent of the requested instruction. This instruction read:

> You may judge the defendants only, members of the jury, on the charges alleged here in this indictment. You may not convict them on any other alleged conspiracy in the event you should conclude that they have engaged in some other conspiracy. Therefore, if you are not convinced beyond a reasonable doubt that a particular defendant knowingly and intentionally joined the

> conspiracy alleged in the indictment, you must find that defendant not guilty. Even if you find that a particular defendant knowingly and intentionally joined a conspiracy other than that alleged in the indictment, you should, nonetheless find that defendant guilty of the charge alleged in the indictment, if you are convinced beyond a reasonable doubt that the defendant knowingly and intentionally joined the single overall conspiracy that is alleged in the indictment, and the elements of which are otherwise contained in these instructions.

[Pet.App. 32-33].

Petitioner claimed below that he was entitled to his requested instruction no. 14 because the general conspiracy instruction given by the court failed to address appellant's theory of defense that the Government had failed to prove the acts charged in the indictment, as opposed to other acts

in other jurisdictions.[1] The panel below held:

> The wording of the defendant's proposed Instruction No. 14 does not, as is claimed, actually focus attention on the issue of whether the government failed to prove that acts charged in the indictment were committed in the Southern District of Illinois as opposed to other jurisdictions. Their instruction complete ignores the issue of venue altogether. It is a mystery how the defense believes that Defense Instruction No. 14, legally (or logically) relates to the defendant's venue-based theory of defense at all.

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[1] Petitioner is well aware of the longstanding proposition that this Court reviews charged instruction errors in the context of the overall jury charge. See, Cupp v. Naughten, 414 U.S. 141, 147 (1973) (holding, "[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge."). Accordingly, petitioner has set forth the entire jury charge in the appendix to this petition - less a portion addressing a CCE count not at issue here - in order to aid this Court with its review.

[949 F.2d at 940, Slip Op. at 17]. The panel below thus erred by construing the requested jury instruction to address only the issue of venue. Instead, the requested instruction related to other acts not charged and specifically addressed the prejudicial nature of the volume of extrinsic other acts evidence which was introduced in the proceedings below.

The panel below further found:

> This instruction is at odds with the indictment itself. It is also in conflict with the court's ruling which permits evidence of acts or conduct not charged in the indictment. Such acts and conduct are elements of the CCE count and the conspiracy count and are proper issues for consideration by the jury.

[949 F.2d at 941, Slip Op. at 18]. The panel thus improperly held that evidence admitted in the trial proceeding pursuant to Fed.R.Crim.P. 404(b) was

properly admissible as direct evidence of the petitioner's guilt of the charged crime. While petitioner does not contend that extrinsic act evidence was introduced as direct evidence of the crime charged in the proceeding below, the panel's misapplication of the rules of evidence evidences its errant reasoning. Since the panel deemed extrinsic act evidence to be admissible as direct evidence of petitioner's guilt of the crime charged, it is obvious that the panel did not even consider that a proper jury instruction was necessary to bar the jury from convicting petitioner for other acts which were not charged in the indictment. Petitioner was thus denied his Fifth Amendment right to a fair trial because the district court denied him an opportunity to present a

valid theory of defense and denied him the opportunity to have the jury correctly instructed about acts for which the petitioner could be convicted under the indictment.

The panel below further erred in analyzing the denial of petitioner's requested instruction no. 14 under a plain error standard of review. The panel below found:

> Only Canino, Marcum, and Malkin objected to the court's refusal to give instruction No. 14 - but none preserved the claim that this instruction was a theory of defense. Thus, we will review the district court's failure to give the defendants proffered instruction only for plain error.

[949 F.2d at 940, Slip Op. at 18]. The court clearly erred in holding that petitioner had not preserved the denial of his requested instruction for appellate review. During the charge

conference the following exchange took place between the court and counsel for all parties:

> MR. SHEPPARD: We are not on trial for anything else and that's basic fundamental first year law student stuff and defendant Marcum does not withdraw defendant's suggested jury instruction no. 14, and specifically requests that it be given.
>
> * * *
>
> THE COURT: Okay, let's start here then. We have got to reconcile. You are not willing to accept the compromise between the government and what Mr. Bloom [counsel for defendant Flynn] and I have suggested.
>
> * * *
>
> MR. SHEPPARD: 14 will be refused then?
>
> THE COURT: 14 is refused.
>
> MR. HIRSCHHORN: I have a separate objection with respect to 14 that I need to address.
>
> * * *
>
> THE COURT: Okay. I will accept your argument as added to Mr.

> Sheppard's and Mr. Hirsch's reason for your wanting to give 14 which I refuse.

[Pet.App. 5-10]. Thus, petitioner clearly did object to the district court's denial of the proposed instruction on convictions and other acts not charged.

Whether petitioner clearly labeled that instruction as a "theory of defense" is irrelevant. Counsel for petitioner made it clear that that instruction was one which petitioner considered important to his being provided a fair trial. It is also quite apparent that the district court fully understood that petitioner was objecting to the denial of the proffered instruction and that the court understood the basis of petitioner's objection. Thus, the panel below erred

in applying a plain error analysis to denial of the requested instruction.

The panel's error in holding that the district court properly denied petitioner's requested other acts instruction compounded the panel's error in holding that the prosecutor's errant double jeopardy argument was not reversible error.[2] The manifest prejudice created by the Government's

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[2] The panel also held that petitioner was not entitled to a requested buyer-seller instruction. [949 F.2d at 941, Slip Op. at 19-20]. Petitioner was entitled to that instruction under controlling precedent within the Seventh Circuit. See e.g., United States v. Baker, 905 F.2d 1100, 1106 (7th Cir. 1990) (reversing a conspiracy conviction holding, "Even a large purchase does not demonstrate these things, any more than a purchase of a skyscraper shows that the buyer has 'joined' the corporate enterprise of the manufacturer.") (citation omitted); United States v. Lamon, 930 F.2d 1183, (Footnote Continued)

misstatement of the law of double jeopardy was compounded by the district court's denial of the requested instruction on other acts evidence. On the one hand, the jury was apprised of substantive acts which petitioner and his co-defendants had committed in other jurisdictions while at the same time the

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(Footnote Continued)
1992 (7th Cir. 1991) (stating, "[E]ven when it is clear that there have been credit sales, such sales will support an inference of a profit-sharing arrangement only when there are 'repeat purchases or some other enduring arrangement that implies knowledge of the scope of the conspiracy.'" (citation omitted); and United States v. Douglas, 818 F.2d 1317, 1321 (7th Cir. 1987) (holding, "Our cases make clear that merely purchasing drugs or other property from a conspiracy, standing alone, can never establish membership in the conspiracy."). The panel erred in holding that the petitioner was not entitled to his requested buyer-seller instruction. This denial further compounded the harm caused petitioner by the prosecutor's incorrect assertion regarding double jeopardy.

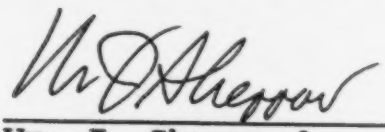
jury was apprised that neither petitioner or any of his co-defendants could be tried subsequent to the ongoing proceeding.

The requested curative instruction on double jeopardy and the requested other acts evidence instruction were both clearly relevant to petitioner's theory of defense; namely, that petitioner might properly be held liable for other crimes in other jurisdictions but was not guilty of the alleged all encompassing conspiracy for which he was being prosecuted. The petitioner was thus deprived of the due process of law to which he is entitled under the Fifth Amendment to the Constitution of the United States by denial of the requested curative instruction.

CONCLUSION

For the reasons given above, this petition for writ of certiorari should be granted.

Respectfully submitted,



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